Supreme Court, U.S.
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92-433

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SEARS, ROEBUCK & COMPANY,
Petitioner,

v.

LOUIS J. BARATTINI, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 10, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals erred in holding that a plaintiff has an absolute right fraudulently to join a party for the sole purpose of defeating federal diversity jurisdiction so long as the complaint adequately alleges a cause of action against the joined party.

LIST OF PARTIES

The parties to the proceeding below were Sears, Roebuck & Company and Louis J. Barattini, Jr.; the Insurance Commissioner of Louisiana, acting as Liquidator of the Anglo-American Insurance Co., intervened.

Pursuant to Rule 29.1 of this Court, Sears, Roebuck & Company identifies the following as non-wholly owned subsidiaries:

Sears Canada, Inc.
Sears Roebuck de Mexico, S.A. de C.V.
SPS Transactions Services, Inc.

Sears, Roebuck & Company has no parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sears, Roebuck & Company, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the court of appeals is included in the Appendix at 1a-9a. The judgment of the court of appeals appears at 10a. The order of the district court announcing the jury's decision and dismissing respondent's suit is included in the Appendix at 11a. The

memorandum decision of the district court denying remand is included in the Appendix at 12a-13a. The sworn statement of Eric Soileau, which petitioner introduced into evidence in the district court in opposing remand, is also included in the Appendix at 14a-21a.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1446 provides, in pertinent part:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended plead-

> ing, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1447(c) provides in pertinent part:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a) . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

STATEMENT

This case arises out of a flagrant abuse of the removal and remand procedures provided by federal law and a manifest fraud on the district court. The district court below specifically found that respondent joined a resident defendant with no intention of obtaining a judgment and therefore *solely* for the purpose of defeating federal jurisdiction. The court of appeals, however, has adopted a standard for fraudulent joinder which completely ignores overwhelming evidence and findings of bad faith conduct and looks only to the facial validity of the cause of action pleaded against the diversity-destroying defendant.

The Fifth Circuit standard conflicts with this Court's long-established fraudulent joinder cases and reveals a square conflict among the circuits. This Court's holdings allow a party opposing a remand motion to demonstrate that, even when a state law cause of action against the resident defendant is facially valid, the joinder was made in bad faith for the sole purpose of destroying diversity. The central purpose of the removal statute, and the diversity jurisdiction which it protects, is thwarted by a standard which rewards a plaintiff's bad faith pleadings. If left in place, the Fifth Circuit's standard will render a

defendant's right of removal a virtual nullity. In addition, this Court should not permit the Fifth Circuit, and those courts of appeals which have adopted its standard, to overrule *sub silentio* this Court's clear, albeit aged precedents defining fraudulent joinder. Accordingly, certiorari should be granted.

1. Petitioner, Sears, Roebuck & Company, is the defendant in a products liability suit filed by respondent, Louis J. Barattini. On August 25, 1987, respondent injured his hand while operating a Sears ten-inch radial saw. A drill bit that respondent had attached to the saw as an auxiliary device severed tendons in respondent's right hand when he attempted to use the saw to make a cut in a piece of plywood while leaving the drill bit attached and operating. The owner's manual contains a specific warning against such dual use, and, as a jury in federal court ultimately determined, the danger presented thereby was open and obvious to all users, especially an experienced "master carpenter" like respondent. As a result of the accident, respondent lost approximately one-quarter of the use of his right hand.

2. Respondent filed a $2 million products liability suit against petitioner on November 4, 1987 in Civil District Court for the Parish of Orleans, Louisiana. No other defendants were named in that complaint. Petitioner therefore removed the suit to the United States District Court for the Eastern District of Louisiana on November 23, 1987. The case proceeded through many months of discovery.

On April 21, 1988, petitioner noticed the deposition of Eric Soileau, the owner of the Sears radial saw. On occasion, Soileau was an employee or subcontractor of respondent. At that deposition, Soileau was represented by a partner of the same law firm representing respondent. The attorney asserted that she represented Soileau and that all contact with him should be made through her.

She also instructed Soileau not to answer several deposition questions on the grounds that they called for information that was protected by the attorney-client privilege.

A pretrial conference was held and a trial date set for August 1, 1988. In accordance with the district court's order respecting exchange of expert witness reports, petitioner filed its report on May 18. Respondent failed to do so, and instead, on June 24, filed a motion to dismiss voluntarily without prejudice together with a separate motion for leave to amend the complaint and add Soileau as a defendant.

The motion to dismiss was heard before the district court on June 29, 1988. Respondent admitted at the hearing that he was unprepared; he was having trouble obtaining an expert witness and, rather than seek an extension, he decided that "the better course of action would be to bring in another party who is a Louisiana defendant." (6/29/88 Hearing Transcript at p.5.) Respondent asserted that he had a strict liability claim against Soileau as the custodian or "garde" of the saw under Louisiana Civil Code § 2317. Respondent also offered that he had learned at Soileau's deposition that a general warning label had fallen off the saw and not been replaced by Soileau. Respondent therefore claimed he also could recover under a negligence count against Soileau. After specifically cautioning respondent against making an amendment in order to destroy diversity, the court granted respondent's request for leave to amend the complaint.

Respondent filed an amended complaint on July 27 and the district court remanded that same day. More than two years then passed in the state court proceedings without any significant developments. During that time Congress amended 28 U.S.C. § 1446(b) to include a one-year limitation upon removal.

Soileau was served with the amended complaint, but never hired counsel and never answered. With the excep-

tion of service of the complaint, respondent made no effort whatsoever to prosecute his cause of action against Soileau. Respondent's counsel never formally withdrew their representation of Soileau, never sought to compel an answer, never sought discovery, and never moved for a default judgment. Instead, respondent moved to dismiss Soileau voluntarily on February 18, 1991. Respondent's actions are explained in the sworn statement of Soileau taken by petitioner on April 17, 1991, see app. 14a-21a, wherein Soileau reveals that he visited the office of respondent's counsel and was told by both respondent and his counsel that they did not intend to pursue the action against him and that he had no cause for worry.[1] Petitioner filed notice of removal one day after Soileau was dismissed on March 4, 1991. Respondent filed a motion to remand, which was heard before the district court on April 24, 1991.

The district court found that petitioner had met its burden of proving fraudulent joinder by clear and convincing evidence. The court acknowledged that a claim against Soileau conceivably existed under Louisiana law, but found that respondent was engaged in a "blatant attempt to circumvent the federal court's exercise of diversity jurisdiction." App. 13a. As evidence of respondent's bad faith, the court cited the addition of Soileau on the eve of the first trial in federal court, his failure to retain counsel and to answer the complaint, and respond-

[1] *See, e.g.* app. 16a, 18a:

Q. All right. When you had this discussion [with respondent's counsel] did he tell you whether or not he had any intention of pursuing that claim against you?

A. [Soileau] He said he did not.

. . .

A. [Soileau] I think he said I didn't have to worry about it. If I remember right, I think that is what he said.

Q. And do you know what he meant by you don't have to worry about it?

A. That they wasn't after any money from me.

ent's failure to seek a default judgment or to compel an answer. The court rejected respondent's "flaunt[ing of] 28 U.S.C. § 1446(b) as a bar" to removal and, refusing to "elevate form over substance," denied the motion. *Id.*

The case was tried before a jury in November 1991. The jury returned a verdict for petitioner. The district court dismissed respondent's suit. App. 11a.

3. The court of appeals reversed. It did not dispute the accuracy of the district court's factual findings; instead, it held that the district court had applied an incorrect standard in determining whether respondent had fraudulently joined Soileau. The court summarized its standard as follows:

> In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

App. 5a (quoting *B. Inc.* v. *Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. Unit A 1981)) (emphasis in original).

Because there was no allegation of fraud with respect to jurisdictional facts (*e.g.*, as to plaintiff's residence or capacity to be sued), the court of appeals focused on the first prong of this test. The court cited its numerous precedents to support its refusal to look beyond the pleadings to anything other than the validity of the state law claim against Soileau. See app. 7a. Observing that "fraud" in this context has a limited meaning, the court adhered to its view that only the validity of the cause of action is relevant in determining which parties are properly before the court. App. 6a. The court of appeals set aside petitioner's favorable jury verdict, thereby rewarding respondent's bad faith in joining a resident defendant against whom he had no intent to seek judgment.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's fraudulent joinder standard has evolved far afield from this Court's precedents. Although one other circuit has adopted the Fifth Circuit's approach, there is a square conflict with other circuit courts that have adhered to this Court's early opinions. As this Court has observed, "[t]he removal standard, which is nationwide in its operation, was intended to be uniform in its application." *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 104 (1941). Certiorari is warranted so that this Court may reaffirm its prior holdings and provide direction and guidance to the courts of appeals and the district courts concerning the proper standard to apply in fraudulent joinder cases.

Certiorari is further warranted because of the significant practical problems the Fifth Circuit's approach creates. The protections of the fraudulent joinder doctrine have become increasingly important since Congress's amendment to the removal statute, limiting the time for removal to one year. This limitation provides greater incentive for plaintiffs to undertake the illegitimate procedural tactics so clearly presented by the record in this case. The legislative history of that amendment reflects Congress's general desire to condemn such tactics.[2] Long ago this Court observed that "[f]ederal Courts should not

[2] Congress intended that the one-year limitation would "reduc[e] the opportunity for removal after substantial progress has been made in state court" and desired to prevent "[s]ettlement with a diversity-destroying defendant on the eve of trial [which would] permit the remaining defendants to remove . . . result[ing] in substantial delay and disruption." H.R. Rep. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032-33. Here, respondent was engaged in an equally repugnant strategy from the plaintiff's side of the aisle; after substantial progress had been made in federal court following the initial removal, respondent joined a non-diverse party on the eve of trial, thereby abrogating petitioner's right of removal and causing substantial delay and disruption.

sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). This case presents a perfect vehicle for the Court to ensure that plaintiffs, such as respondent here, do not engage in the sharp tactics condemned both by this Court and Congress.

a. This Court's fraudulent joinder cases are all quite old, and although the removal statute has changed little, the Fifth Circuit has adopted a rule clearly at odds with these precedents. In *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921), this Court announced a fraudulent joinder standard that upheld removal under circumstances in which the Fifth Circuit undoubtedly would remand today. The case involved facts similar to those here; an employee sued his diverse employer and a resident co-employee for personal injuries, alleging a statutory claim against the employer and a common law negligence claim against the co-employee. The Court held that the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy," *id.* at 97, and upheld the district court's refusal to remand on the ground that the resident party was joined as a defendant "*without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the employer's right of removal.*" *Id* at 98 (emphasis added).

Most important, however, was the Court's observation that although the parties differed as to whether joint liability could be imposed under Alabama law, "we do not find it necessary to solve this question." Instead, the Court concluded that "[a]s the joinder was a sham and fraudulent—that is, without any reasonable basis in fact and without any purpose to prosecute the cause in good

faith against the coemployee—*the result must be the same whether the local law makes for or against joint liability*." *Id.* at 98-99 (citing *Wecker*, 204 U.S. at 183; *Chicago, R.I. & Pac. Ry.* v. *Schwyhart*, 227 U.S. 184, 194 (1913)) (emphasis added). Thus, the Court rejected precisely the same test for "liability under local law" applied by the Fifth Circuit. That is, this Court looked directly at the evidence of the plaintiff's lack of intent to seek a joint judgment and, because of the plaintiff's bad faith, upheld the refusal to remand.[3]

The Fifth Circuit's overly narrow fraudulent joinder standard thus represents a significant departure from this Court's precedents, which the Court has never questioned. Review is warranted to reaffirm the continuing validity of these decisions.

b. The Fifth Circuit's long-established standard also conflicts with those applied by other circuit courts of appeals. Both the Third Circuit and the Tenth Circuit apply fraudulent joinder standards that permit the district court to consider not only the validity of the cause of action pleaded against the resident defendant, but also manifest evidence of plaintiff's bad faith in joining a defendant against whom the plaintiff does not intend to seek a joint judgment. *E.g.*, *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 959 (1991); *Abels* v. *State Farm Fire & Casualty Co.*, 770 F.2d 26, 32 (3d Cir. 1985); *Smoot* v. *Chicago, R.I. & Pac. Ry.*, 378 F.2d 879, 881-82 (10th Cir. 1967); *Dodd* v. *Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964).

In *Smoot*, the Tenth Circuit held that "upon allegations of fraudulent joinder designed to prevent removal, fed-

[3] The Court had previously announced a similar standard in *Chesapeake & Ohio Ry.* v. *Cockrell*, 232 U.S. 146 (1914): "[W]hen . . . a resident defendant is joined with the non-resident, the joinder, *even although fair upon its face*, may be shown by a petition for removal to be only a fraudulent device to prevent removal." *Id.* at 152 (emphasis added).

eral courts may look beyond the pleadings to determine if the joinder, *although fair on its face*, is a sham or fraudulent device to prevent removal." 378 F.2d at 881-82 (citing *Wilson*, 257 U.S. 92 (1921)) (emphasis added). Quoting its earlier decision in *Dodd*, the Tenth Circuit also observed that once a defendant has made specific allegations of a fraudulent joinder, "the court may pierce the pleadings, . . . consider the entire record, and determine the basis of joinder by any means available." *Id.* at 882 (quoting *Dodd*, 329 F.2d at 85).[4] If the district court determines that "continued joinder serves only to frustrate federal jurisdiction" the presence of the resident defendant cannot justify remand. *Id.*

In *Abels*, the Third Circuit announced its standard as follows: "Courts have found joinder to be fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.*" 770 F.2d at 32 (quoting *Goldberg* v. *CPC Int'l*, 495 F. Supp. 233, 239 (N.D. Cal. 1980)) (emphasis added). Further, the court in *Abels* was careful to note that the "[p]laintiff's conduct in the instant case is consistent with an intention to actually proceed against [the resident] defendants." *Id.*

In contrast, at least one other circuit has adopted the Fifth Circuit's crabbed fraudulent joinder standard. In

[4] "Piercing" or "looking beyond the pleadings" to determine whether a plaintiff has fraudulently joined a diversity-destroying defendant is not a novel proposition. As the Fifth Circuit itself notes (app. 8a), a district court must undertake a factual examination if the fraudulent joinder charge is based upon the false pleading of jurisdictional facts, or that the plaintiff had no basis in fact for bringing the particular cause of action against the resident defendant. *See, e.g., Smoot* v. *Chicago, R.I. & Pac. Ry.*, 378 F.2d 879, 882 (10th Cir. 1967) (court looked "beyond the pleadings" and discovered that 15 months prior to the accident that gave rise to the suit, the allegedly negligent co-employee had left the railroad's employ).

Coker v. *Amoco Oil Co.*, 709 F.2d 1433 (11th Cir. 1983), the Eleventh Circuit stated its standard in unequivocal terms:

> If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.

Id. at 1440-41 (citing *Bobby Jones Garden Apartments* v. *Suleski*, 391 F.2d 172, 177 (5th Cir. 1968) and *Parks* v. *New York Times Co.*, 308 F.2d 474, 477-78 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964)). See also *Boyer*, 913 F.2d at 111 (citing both *Abels* and *Coker* but failing to reconcile the difference in standards). There is no question that this case would now be at an end if it had arisen in either the Third or the Tenth Circuit. Only by blinding itself to manifest fraud did the court of appeals conclude that the judgment in favor of petitioner required reversal. Accordingly, the question whether a multistate defendant such as Sears will be subject to blatantly improper procedural tactics will depend solely upon the state in which it happens to be sued. Such conflict and confusion is especially pernicious when the removal statute was intended to be applied in a uniform fashion, and the conflict raises issues of fundamental procedural fairness.

c. No sensible structural or jurisprudential argument supports the Fifth Circuit standard, making this Court's review particularly appropriate. The Fifth Circuit's appeal to the limited nature of federal diversity jurisdiction, *see B. Inc.* v. *Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. Unit A 1981), in justifying its standard only begs the question; in this context fraudulent joinder defines the limits of diversity jurisdiction.[5] The fundamental task

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[5] While the removal and remand statutes are to be construed strictly as well as uniformly, *see Shamrock Oil & Gas Co.* v. *Sheets*,

in determining whether true and complete diversity exists, as this Court's early cases and the commentators note, is sorting out which parties are to be disregarded and which included. See *Wecker*, 204 U.S. at 182-83 (courts should look beyond pleadings and "take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protections of their rights in those tribunals") (quoting *Alabama Great S. Ry.* v. *Thompson*, 200 U.S. 206 (1902)); see also 14A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3723, pp. 334-54 (2d ed. 1985) (court will realign parties, disregard nominal defendants, and disregard defendants improperly or collusively joined) (hereafter "Wright & Miller"); 1A J. Moore & B. Ringle, Moore's Federal Practice 2d ¶ 0.161[2], p. 272 (1992) ("parties fraudulently joined should be disregarded in determining diversity") (hereafter "Moore's").[6] Cf. *Smith* v. *Sperling*, 354 U.S.

313 U.S. 100, 108-09 (1941), this Court has long recognized that litigants may not rely on formalism to gain unfair advantage; courts need not construe statutes literally where there has been "a fraud upon the law" in attempting to create or defeat diversity jurisdiction. *E.g.*, *Morris* v. *Gilmer*, 129 U.S. 315, 329 (1889) ("If the removal be for the purpose of commiting a fraud upon the law, and to enable the party to avail himself of [federal] jurisdiction . . . and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicil[e]") (citation omitted); *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 182-83 (1907) (where there is an "attempt[] to sue in the state courts with a view to defeat federal jurisdiction . . . Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties" of their removal rights).

[6] The Fifth Circuit's standard also can find no support from arguments based upon expediency or objectivity. There is no reason to conclude that a district court inquiry into the validity of a state law cause of action or the accuracy of jurisdictional facts (a party's domicile turns on questions of intent, for example) would be less time consuming than an inquiry into whether the plaintiff's joinder of another party was for the sole purpose of defeating federal jurisdiction. In addition, while the circuit courts may disagree as

91, 97 (1957) ("Absent collusion, there is diversity jurisdiction when the real collision of issues . . . or . . . 'the actual controversy,' is between citizens of different States") (citations omitted). The principle common to the analysis of these commentators and to this Court's fraudulent joinder precedents is that a district court may properly disregard a defendant who would not otherwise be a defendant *but for* the plaintiff's desire to defeat diversity.

This principle, however, cannot rationally be limited to resident defendants against whom no possible cause of action lies (*viz.* plaintiffs who have immunity) and resident defendants against whom there is no factual basis for an allegation (*e.g.*, an allegedly negligent co-employee who in fact had been terminated 15 months before the tortious accident). It also encompasses those resident defendants against whom the plaintiff never intended to proceed or who are in collusion with the plaintiff. See 14A Wright & Miller § 3723 at 350-53 (joinder is fraudulent where plaintiff "does not intend to secure a judgment against that defendant"); 1A Moore's ¶ 0.161[2] at 272 (fraudulent joinder "is said to depend on whether the plaintiff really intended to obtain a judgment against [the non-diverse defendant]"). To be sure, an intent to defeat federal jurisdiction is irrelevant where there are other indicia of a plaintiff's ability and intent to proceed against all defendants. But if—as the district court found here—a plaintiff's *sole* intent is to deprive a defendant of its statutory right embodied in 28 U.S.C. § 1332, then, even if the claim is colorable, that plaintiff has acted in bad faith and the joinder is fraudulent. 14A Wright & Miller § 3723 at 343-47.

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to what constitutes "bad faith," they apply a uniformly heavy evidentiary burden that promotes both expediency and objectivity. *E.g.*, *Dodd* v. *Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964) ("the issue must be capable of summary determination and be proven with complete certainty"); *Parks* v. *New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962) ("A claim of fraudulent joinder must be pleaded with particularity, and supported by clear and convincing evidence"), *cert. denied*, 376 U.S. 949 (1964).

The Fifth Circuit standard thus impermissibly narrows "fraudulent joinder" to guard against only two devices which might be misused in an attempt to defeat jurisdiction—falsely pleading jurisdictional facts and pleading that a state law cause of action exists when in fact none does. The greatest threat to the statutory right of removal, however, comes from the "nominal" defendants who happen to fall within the broad confines of potential civil liability. Hence, the doctrine of fraudulent joinder cannot fully protect a defendant's right of removal unless defendants also are permitted to adduce evidence to show that, but for the desire to defeat federal jurisdiction, the resident defendant party would not have been joined.

* * * *

This case is the proper vehicle through which the Court should reaffirm its earlier fraudulent joinder holdings. The district court found not only that the respondent had stated a conceivable cause of action against the resident defendant, but also that respondent's actions were a "blatant attempt" solely to defeat diversity jurisdiction and deprive petitioner of its statutory right of removal. App. 13a. Thus, the facts below place this case outside the restrictive fraudulent joinder standard applied by the Fifth Circuit, but firmly within the "bad faith" standard set forth in this Court's precedents and those of the Third and Tenth Circuits. This case also presents the most extreme application of the Fifth Circuit's approach. If there is no relief from plaintiff's tactics here, then the protections in 28 U.S.C. § 1332 are rendered meaningless by the sharp practices of the plaintiffs' bar. Accordingly, review by this Court is clearly warranted to correct this recurring abuse of the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 10, 1992

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-9545

Summary Calendar

LOUIS J. BARATTINI, JR.,
Plaintiff-Appellant,

v.

SEARS, ROEBUCK & COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(91-CV-896)

[Filed June 12, 1992]

Before KING, EMILIO M. GARZA, and DEMOSS, Circuit Judges.

PER CURIAM: *

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Louis J. Barattini, Jr., injured his hand while operating a saw owned by Eric Soileau and manufactured by Sears, Roebuck & Co. (Sears). He filed a products liability action against Sears in a Louisiana state court, and, after the action was twice removed to federal court, lost in a trial on the merits. Barattini now appeals, arguing that the district court had no jurisdiction over the case because the second removal occurred after the one-year limitations period of 28 U.S.C. § 1446(b). We agree and vacate the judgment.

I. BACKGROUND AND PROCEDURAL HISTORY

Barattini, a resident of Louisiana, sustained a severe injury to his hand on August 27, 1987, while using a Sears Craftsman 10-inch radial arm saw. Soileau, the owner of the saw, is also a resident of Louisiana. On November 4, Barattini filed a petition for damages against Sears in the Civil District Court for the Parish of Orleans. Alleging diversity of the parties, Sears filed a notice of removal on November 23. The parties conducted discovery, and the case was set for trial on August 1, 1988. On July 27, 1988, however, Barattini amended his complaint, adding negligence and strict liability causes of action against Soileau. In a hearing nearly a month earlier, Barattini had asserted that the availabiilty of a cause of action against Soileau did not come to light until Soileau's deposition was taken in April 1988.[1] Judge Wicker indicated at the hearing that Barattini should add Soileau as a defendant in the federal action, and that she would then grant a motion to remand to state court. After the complaint was amended, Judge Wicker honored this promise.

Although Soileau was served in the state court action, he never filed an answer and never retained a lawyer to represent him. Barattini did not, however, move for

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[1] Barattini stated that he learned at Soileau's deposition that Soileau had neglected to replace a warning label that had fallen off the saw.

a default judgment against Soileau, so Sears filed a "Motion to Compel Plaintiff to Enter Default Judgment Against Defendant Eric Soileau, or Alternatively, Dismiss All Claims Against Eric Soileau. . . ." Barattini thereafter moved to dismiss his claims against Soileau without prejudice, and, on March 4, 1991, the state court granted the motion.

The next day, Sears, again citing complete diversity, removed the case for the second time to federal district court. Sears asserted in a memorandum accompanying that motion that the one-year limit on removal established by the 1988 amendment to 28 U.S.C. § 1446(b) was inapplicable because the joinder of Soileau had been fraudulent. Barattini immediately filed a motion to remand, arguing that joinder was not fraudulent because he had viable causes of action against Solieau under Louisiana law. According to Barattini, the fact that Soileau was insolvent and that it made little sense to pursue a judgment against him was not relevant. After a hearing, the district court held that Sears had carried its burden of proving fraudulent joinder. Although Barattini could proceed against Soileau under Louisiana law, the court held, it would not allow him to evade the substance of the law of fraudulent joinder where his prosecution of the state court action revealed a lack of intent to recover from Soileau. The case proceeded to trial before a jury, and Sears prevailed. Barattini appeals, raising only the issue of the district court's jurisdiction.[2]

II. ANALYSIS

Under 28 U.S.C. § 1446(b), as amended by the Judicial Improvements and Access to Justice Act of 1988, removal of cases on diversity grounds more than one year

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[2] We have jurisdiction over the denial of a motion to remand when it is coupled with the appeal of a final judgment. *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1160 (5th Cir. 1987), *cert. denied*, 493 U.S. 1074 (1990); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. Unit A 1981).

after commencement of the action is prohibited.[3] Courts have agreed that the one-year limitations period applies to cases pending in state court on the amendment's enactment date of November 19, 1988.[4] Because this case was pending in state court on November 19, 1988, and because Sears removed to federal court more than one year after commencement of the action, the plain language of § 1446(b) would appear to bar removal.[5] The only justification asserted by the district court for "tolling" the limitations period was Barattini's fraudulent joinder of Soileau. We need not decide the extent to which fraudulent joinder functions as an implied exception to the one-year limitations period of § 1446(b), because we conclude that the addition of Soileau as a defendant was not fraudulent as defined by our cases.

The removing party bears the burden of establishing fraudulent joinder, *Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.), *cert. denied*, 111 S. Ct. 60 (1990); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. Unit A 1981), and this burden is a heavy one.

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[3] The statute provides, in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b).

[4] *E.g., Molden v. Firestone Tire & Rubber Co.*, 754 F. Supp. 521, 523 (M.D. La. 1990); *Jennings v. Bunch Trucking Co., Inc.*, 748 F. Supp. 457, 458 (N.D. Miss. 1990); *Royer v. Harris Well Serv., Inc.*, 741 F. Supp. 1247, 1248 (M.D. La. 1990).

[5] We need not determine whether the action was commenced at the time the original state court complaint was filed or at the time the case was renamed, for it is clear that the case was removed more than one year from both dates.

Id. In *B., Inc.*, we summarized the two possible ways a removing party may show fraudulent joinder:

> In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

Id. (emphasis in original, citations omitted); *see also Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984); *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964). There is no dispute that Soileau has at all relevant times been a Louisiana resident, so the second method is unavailable to Sears. What the parties contest is the precise contours of the first method. Barattini argues that joinder is fraudulent only where state law clearly precludes the plaintiff from recovering from the non-diverse defendant. As he did before the district court, Barattini asserts that Article 2317 of the Louisiana Civil Code clearly *grants* him causes of action in negligence and strict liability against Soileau as owner of the saw. Thus, he says, his motive for joining Soileau and his conduct with respect to Soileau in the state court is irrelevant. Sears does not dispute the existence of causes of action against Soileau under Louisiana law, but instead appears to argue in favor of a more expansive view of the notion of fraud. Sears focuses on Barattini's intent not to obtain a judgment against Soileau (as evidenced by Barattini's failure to prosecute the state court action or seek a default judgment), contending that this is "bad faith" conduct which cannot defeat removal. Moreover, Sears says, the rule that joinder is fraudulent when no recovery can be obtained from the non-diverse defendant extends to cases in which there is evidence of no intent to recover.

The rule cited by Barattini has been consistently followed in this circuit. In *B., Inc.*, we described the test for fraudulent joinder as follows:

> If, having assumed all of the facts set forth by the plaintiff to be true and having resolved all uncertainties as to state substantive law against the defendants, the district court should find that there is no possibility of a valid cause of action being set forth against the in-state defendant(s), *only then can it be said that there has been "fraudulent joinder."*

663 F.2d at 550 (citing *Tedder v. FMC Corp.*, 590 F.2d 115 (5th Cir. 1979) and *Keating v. Shell Chem. Co.*, 610 F.2d 328 (5th Cir. 1980)) (emphasis added). In *Green*, we reiterated the test by stating it in the converse: "[T]here must be no possibility of a valid state cause of action being set forth against the in-state defendant before the court may hold that there has been fraudulent joinder." 707 F.2d at 206 (citations omitted). Earlier cases, too, have held that a defendant can establish fraudulent joinder only by clearly showing the nonexistence under state law of a right of recovery.[6] Thus, consistent with the view that fraud in this context is a term of art, *see* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3723, at 354 (2d ed. 1985), we have been careful to adhere to a strict view of fraudulent joinder. *B., Inc.*, 663 F.2d at 550; *Green*, 707 F.2d at 206; *see also Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989).

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[6] *See Parks*, 308 F.2d at 478 ("there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged"); *Bobby Jones Garden Apts. v. Suleski*, 391 F.2d 172, 177 (5th Cir. 1968) ("where there have been allegations of fraudulent joinder . . . the question is whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved").

In *B., Inc.*, we pointed out that in the cases in which we had found fraudulent joinder the plaintiff could establish no cause of action against the non-diverse defendant. Our cases in the intervening decade have been no different. For example, in *Jones v. Newton*, 775 F.2d 1316 (5th Cir. 1985) (per curiam), we held that remand would be improper where the cause of action asserted against the non-diverse defendant was cognizable only in federal court. *Id.* at 1318. In *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987), *overruled on other grounds, Thomas v. Capital Security Serv., Inc.*, 836 F.2d 886 (5th Cir. 1988) (en banc), we affirmed the district court's denial of a motion to remand where state law and a contractual agreement clearly precluded the plaintiffs, sublessors, from suing the non-diverse original lessor. *Id.* at 1123. And in *LeJeune v. Shell Oil Co.*, 950 F.2d 267 (5th Cir. 1992), remand was properly denied where the plaintiff's vicarious liability theory clearly was foreclosed under Louisiana law. *Id.* at 271. *See also Alcom Electronic Exchange, Inc. v. Burgess*, 849 F.2d 964, 969 (5th Cir. 1988) (joinder fraudulent where plaintiff was barred under state law from recovering on a contract claim against an agent); *Carriere*, 893 F.2d at 101 (joinder fraudulent where plaintiff could recover from neither non-diverse defendant under Louisiana law). On the other hand, in the cases since *B., Inc.* in which we have found remand proper, the decision turned specifically on the existence of a state law cause of action. *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 43 (5th Cir. 1992); *Laughlin*, 882 F.2d at 191; *East Texas Mack Sales, Inc. v. Northwest Acceptance Corp.*, 819 F.2d 116, 119 (5th Cir. 1987); *Green*, 707 F.2d at 208.

Sears would have us go substantially beyond this precedent and hold that evidence of Barattini's intent not to prosecute the suit against Soileau in state court functions as an independent basis for a finding of fraudulent joinder. The cases cited by Sears in support of an intent inquiry, however, are faithful to our precedent in

that they turn on the unavailability of a state law cause of action. In *Matthews v. Nissan Motor Co., Ltd.*, 763 F. Supp. 873 (S.D. Miss. 1991), the court commented on the plaintiff's intent in joining a non-diverse defendant, but the ultimate decision to deny a motion to remand was based on the lack of any factual basis under Mississippi law for imposing liability on that defendant. *Id.* at 876 & n.3. And in *Elder v. Wal-Mart Stores, Inc.*, 751 F. Supp. 639 (E.D. La. 1990), the court held that the defendant had met its burden of proving fraudulent joinder because the plaintiff's allegations could not possibly state a cause of action against the non-diverse defendant. *Id.* at 642. Sears certainly is correct that we can "pierce the pleadings" to determine whether joinder was fraudulent, but we do so for the specific purpose of determining whether the plaintiff can possibly recover from the non-diverse defendant. *Carriere*, 893 F.2d at 100. The fact that the evidence behind the pleadings reveals intent to join a defendant for the specific purpose of defeating diversity jurisdiction does not affect the analysis so long as there is a viable cause of action against the defendant. *See generally*, C. Wright, A. Miller & E. Cooper, *supra*, at 345-46.[7]

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[7] The very problem that has arisen in this case was acknowledged in the Practice Commentary to the 1988 Revision of 28 U.S.C. § 1446 (b) (by David D. Siegel) (reproduced following 28 U.S.C. § 1446 (b), Supp. 1991). Professor Siegel points out that a plaintiff desiring to resist removal to federal court may join a non-diverse defendant whom the plaintiff does not really intend to sue but who is arguably liable on the claim under the applicable state law. The plaintiff can languish in state court for more than one year, insulating himself from removal, and then drop the undesired defendant. The only way in which it is suggested a diverse defendant may defeat this ploy is by raising fraudulent joinder. In order to succeed, however, such a defendant must prove convincingly that the plaintiff cannot possibly recover "under the relevant law as applied to the facts as pleaded." *Id.* at 4. Professor Siegel acknowledges that the fraudulent joinder argument will work only rarely, and does not suggest that the doctrine applies where the

We also reject Sears' argument that there was no possible recovery against Soileau due to an agreement between the two that Barattini would not execute on any money judgment he obtained. Sears has not direct evidence of any agreement, but merely cites a statement taken from Soileau several days before the hearing on the motion to remand. Sears apparently did not give Barattini notice of its intent to take this "statement," so Barattini did not have an opportunity to question Soileau. Any interpretation of Soileau's words as evidence of a collusive agreement is quite a stretch in light of the leading questions and lack of cross-examination. In any event, our cases are clear that the relevant question is whether state law, not any other factor, functions as an impediment to recovery.

III. CONCLUSION

We agree with the parties and with the district court that Barattini had valid causes of action against Soileau under Louisiana law. In the Fifth Circuit, the inquiry ends there. The joinder of Soileau being proper, the district court erred in invoking the principles of fraudulent joinder to avoid the one-year limitations period of 28 U.S.C. § 1446(b). The district court had no jurisdiction to hear this case. Accordingly, the judgment is VACATED and the case REMANDED with instructions to remand to state court.

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plaintiff intends to defeat federal jurisdiction but joins a party against whom he clearly has a state law cause of action. *Id.*

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-9545
Summary Calendar

D.C. Docket No. 91-CV-896

LOUIS J. BARATTINI, JR.,
Plaintiff-Appellant,

versus

SEARS, ROEBUCK & COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before KING, EMILIO M. GARZA, and DEMOSS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court with instructions to remand to the state court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

June 12, 1992

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number 91-896
SECTION "L"

LOUIS BARATTINI

versus

SEARS ROEBUCK AND COMPANY

JUDGMENT

[Filed Nov. 19, 1991]

[Date of Entry Nov. 19, 1991]

Considering the interrogatories answering by the Jury herein; accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Sears Roebuck and Company and against, plaintiff, Louis Barattini, dismissing plaintiff's suit at his costs.

New Orleans, Louisiana, this 18th day of November, 1991.

/s/ Veronica D. Wicker
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 91-0896
SECTION "J" (L)

LOUIS J. BARATTINI, JR.

versus

SEARS, ROEBUCK & COMPANY

MINUTE ENTRY

CARR, J.

April 23, 1991

[Filed Apr. 25, 1991]

[Date of Entry Apr. 26, 1991]

This matter is before the Court on plaintiff's motion to remand. [Document 8]

Determining in its discretion that oral argument is unnecessary, the Court now CANCELS the hearing previously set for April 24, 1991.

The Court recognizes that the changes to 28 U.S.C. § 1446(b) placed a one year limit on a removal action. The court is also familiar with cases interpreting the one year removal provision and its interaction with the doctrine of fraudulent joinder. *Carriere v. Sears, Roebuck*

& Co., 893 F.2d 98 (5th Cir. 1990); *Laughlin v. Prudential Life Insurance Co.*, 882 F.2d 187 (5th Cir. 1989); *Royer v. Harris Well Service, Inc.*, 741 F. Supp. 1247 (E.D. La. 1990). However, the Court finds that those cases are distinguishable because the joinder of the non-diverse party in those cases was not such a blatant attempt to circumvent the federal court's exercise of diversity jurisdiction.

Both the Fifth Circuit and the United States Supreme Court have previously cautioned about using the letter of the law to defeat the substance of the law. *Wecker v. National Enamelling & Stamping Co.*, 204 U.S. 176, 27 S. Ct. 184 (1907); *Panalpina Weltransport GMBH v. Geosource, Inc.*, 764 F.2d 352 (5th Cir. 1985).

Through the submission of depositions and affidavits, Sears has more than met its burden of proving fraudulent joinder. *Green v. Amarada Hess Corp.*, 707 F.2d 201 (5th Cir. 1983). Plaintiff herein joined, on the eve of a federal court trial, a non-diverse defendant against whom a claim conceivably existed under Louisiana law. Because a claim did exist against the non-diverse defendant, Sears was precluded from attempting to remove the action. The non-diverse defendant was served with the amended complaint, but never filed an answer. Nor did the non-diverse defendant ever retain counsel. Plaintiff never motioned for a default judgment against the non-diverse defendant or sought to compel him to file an answer. Instead, plaintiff kept the non-diverse defendant in the state court action for over one year, then dismissed him. Plaintiff now flaunts 28 U.S.C. § 1446(b) as a bar to Sears' removal action.

This Court refuses to condone plaintiff's conduct and, viewing such conduct as an attempt to elevate form over substance, now DENIES plaintiff's motion to remand.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 91-0896
SECTION "L"

LOUIS J. BARATTINI, JR.

VS.

SEARS, ROEBUCK COMPANY

Sworn Statement of ERIC SOILEAU, taken in the home of Eric Soileau located at 150 Destrehan Drive, Destrehan, Louisiana, on Wednesday, April 17, 1991.

APPEARANCES:

BERNARD, CASSISA, SAPORITO & ELLIOTT
(By CARL J. GIFFIN, JR., ESQ.)
P.O. Box 55490
Metairie, Louisiana 70055
1615 Metairie Road
Telephone: 834-2612

Attorney for Sears, Roebuck Company

ERIC SOILEAU,

after having been first duly sworn by the above-mentioned Certified Shorthand Reporter, was examined and testified as follows:

EXAMINATION BY MR. GIFFIN:

Q. Mr. Soileau, my name is Carl Giffin, Jr. We've previously met, and we're here today to take your sworn statement concerning facts surrounding your becoming a defendant in this lawsuit.

You understand the testimony you are going to be giving today is under oath; is that correct, sir?

A. Yeah.

Q. And I guess I will just first ask that you state your name and your address for the record, sir.

A. Eric Soileau. Post Office Box 2. 150 Destrehan Drive. Destrehan, Louisiana.

Q. Mr. Soileau, I am going to be asking you some questions about the manner in which you became a defendant in this lawsuit which has been brought by Mr. Barattini back in the 1988 time frame. Do you recall that you were added as a defendant, sir?

A. Yes, I do.

Q. Okay. Before you were added as a defendant were you ever contacted by either Mr. Barattini or his lawyers to inform you that you were going to be added as a defendant in the case?

A. I think so.

Q. Okay. And what did they tell you as to why they were adding you as a defendant?

A. I think he said to move it to a different court.

Q. To move what to a different court?

A. The suit, I guess.

Q. Okay. And do you remember approximately when that was? The case was set to go to trial on August 1st of 1988. In reference to that time frame, can you give

me an estimate as to when it was that you had this discussion?

A. Not really.

Q. All right. It was sometime before August of 1988?

A. I don't know.

Q. All right.

A. You know, like I said, I don't remember dates too well on stuff like that.

Q. Okay. And who was that conversation with, Mr. Barattini or his lawyer?

A. First with Louis, and then with Joe Ward.

Q. All right. And did they call you on the phone and tell you this?

A. No. They called me into his office.

Q. Did they ever tell you why they wanted to move the case to another court?

A. I don't really remember. I think it had something to do with a jury or something. I don't know.

Q. A jury? What about a jury? Getting a different jury forum or something like that?

A. I think so.

Q. All right. And you say first you met with Mr. Barattini, and then you went to Mr. Ward's office. Do you remember what you discussed at his office?

A. That's what we discussed.

Q. All right. When you had this discussion did he tell you whether or not he had any intention of pursuing that claim against you?

A. He said he did not.

Q. He did not have an intention of pursuing the claim?

A. (Moves head from side to side).

Q. Is that correct?

A. Right.

Q. He told you not to worry about it?

A. Something like that.

Q. Okay. Did he tell you that you didn't need to get a lawyer?

A. I don't think that was discussed.

Q. Okay. Well, can you tell me the substance of the conversation? You said he did not intend on pursuing the claim against you. Can you tell me the substance of that conversation?

A. That's been a long time ago.

Q. I know. Well, basically what he told you about why he didn't want to pursue you.

A. I think it was that the suit wasn't going to be or wasn't going against me. It was going to be against Sears.

Q. So he mentioned that they were going to proceed against Sears and just have you in the suit in name only?

A. I guess that's what it was.

Q. Did they ever demand any money from you as a result of your involvement in the case?

A. No.

Q. Okay. After you had this conversation with Mr. Ward, did you ever talk with him further about the case?

A. No.

Q. After you had that conversation with Mr. Ward at his office were you served with papers in the case?

A. Yes.

Q. I'm just looking for a document here that I have. I have a document here and it's entitled Civil District Court for the Parish of Orleans, and it was directed to Eric Soileau, 150 Destrehan Drive.

It's been attached as Exhibit #14 to Sears list of information pertaining to the removal filed on behalf of Sears, and that shows that the amended petition was served on you on February 8th, 1989.

Do you remember receiving that document and the amended petition, Mr. Soileau?

A. I received something, yeah. You know, I can't say positively this is it; but, I mean, I have no reason to believe that wouldn't be it.

Q. Okay. I am looking to see if there was a signature by you on this document.

A. I didn't sign it.

Q. It says domiciliary service on your wife, but you did receive notice that you had been sued; is that correct, sir?

A. Yes.

Q. After you received notice that you had been sued, did you ever talk with Mr. Ward about the fact that you had received these suit papers?

A. No.

Q. Did you ever talk with Mr. Barattini about the fact that you had received those suit papers?

A. Yes.

Q. What did Mr. Barattini tell you that you should do in connection with receiving those suit papers?

A. That's a good question.

Q. Well, do you remember what you all talked about when you received the suit papers?

A. I think he said I didn't have to worry about it. If I remember right I think that's what he said.

Q. And do you know what he meant by you don't have to worry about it?

A. That they wasn't after any money from me.

Q. And that was in February of 1989. They weren't after any money from you. After that time did you ever have any other conversations with Mr. Barattini concerning the progress of the lawsuit?

A. Not really. I might of asked him when was it ever going to come about, but that's about all.

Q. On any occasion that you spoke with Mr. Barattini after you had been named as a defendant in the case, did he ever tell you that you had to file an answer to that complaint?

A. No, but when I read the thing it said that I had to respond to it or I automatically was—

Q. In default?

A. In default, yes.

Q. Did you discuss that with Mr. Barattini?

A. No, I didn't.

Q. Did Mr. Barattini ever tell you anything other than you didn't have to worry about this suit?

A. Not that I recall.

Q. When is the last time that you recall talking to Mr. Barattini about this suit?

A. It's been a few months. I can't say exactly.

Q. And do you remember what you all discussed at that time?

A. The only thing we ever discussed really about it was when it was going to take place.

Q. Okay. Were you ever informed by Mr. Barattini that the suit had been dismissed as against you?

A. Repeat that.

Q. Did Mr. Barattini ever tell you that the claims that were brought against you had been dismissed?

A. He said he thought they were going to be, but that's about as far as they went.

Q. Did they ever tell you why they were going to dismiss the claims against you?

A. No.

Q. And have you ever received any information from either Mr. Ward or Mr. Barattini indicating that the claims against you have been dismissed?

A. No.

Q. Okay. Was the first time you learned you had been dismissed from the case was when I contacted you?

A. If that's official, yeah, I guess so.

Q. Okay. I had received a notification that you had been dismissed, and then I contacted you. You had no other information that you had been dismissed?

A. No.

Q. After I contacted you did you discuss with either Mr. Ward or Mr. Barattini the fact that you had been dismissed?

A. No.

Q. Okay. Mr. Soileau, I believe those are all the questions I have for you, and I just would like to ask you if the answers that you have given to my questions are truthful to the best of your recollection, sir?

A. They have.

Q. And you have given us your permission on the record to take this statement; is that correct, sir?

A. I guess I have no choice.

Q. No, you do have a choice; but, I mean, you have given it of your own free will; is that correct, sir?

A. Oh, yes, yes.

Q. Thank you very much, Mr. Soileau.

(Whereupon, the taking of the witness' testimony was concluded.)

CERTIFICATE

I do hereby certify that the above-named witness, after having been first duly sworn by the undersigned, by authority of Section 961.1 of Title 13 of the Louisiana Revised Statutes of 1950 and amended and re-enacted by Act 85 of the 1968 Regular Session of the Louisiana Legislature, to testify to the truth, the whole truth and nothing but the truth, did testify as hereinabove set forth;

That the testimony was reported by me in shorthand and transcribed under my personal direction and supervision, and is a true and correct transcript to the best of my ability and understanding;

That I am not of counsel, not related to counsel or the parties hereto, and not in any way interested in the event of this suit.

/s/ Toni Mortillaro Kawash
Certified Shorthand Reporter